No. 94-1572

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,

Petitioner

v.

MALONE FREIGHT LINES, INC.,
QUANTUM SERVICES, INC. and
TAMMY HIBSHMAN, as the Personal Representative of
the Estate of Brian Hibshman, Deceased,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Robert E. Konchar*
Michael McDonough
Stanley M. Herkelman
MOYER & BERGMAN, P.L.C.
2720 First Avenue, N.E.
P.O. Box 1943
Cedar Rapids, IA 52406-1943
(319) 366-7331

*Counsel of Record

Wm. David Duke
ROBINSON, STALEY & MARSHALL
A Professional Association
400 West Capitol
Suite 2891
Little Rock, AR 72201
(501) 374-3818

Attorneys for Respondents

BEST AVAILABLE COPY

19 pp

QUESTION PRESENTED

Whether Respondents' state common law claims and defenses that the grade crossing warning devices were inadequate were pre-empted by federal law when the Federal Highway Administration had approved plan and cost estimates to upgrade the warning devices at the crossing, even though the automatic gates with flashing lights required by the regulations were not installed or operating nearly one year later when the accident giving rise to this case occurred.

PARTIES TO THE PROCEEDING

All of the parties to the proceeding in the United States Court of Appeals for the Eighth Circuit are those set forth in the caption.*

*Malone Freight Lines, Inc. is a wholly-owned subsidiary of CRST International, Inc. which in turn is a closely held corporation. Quantum Services, Inc. is also a closely held corporation. There are no other parent or subsidiary corporations that are required to be disclosed under Supreme Court Rule 29.1.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Authorities	iv
Statement of the Case	1
Reasons for Denying the Writ	3
Conclusion	13

TABLE OF AUTHORITIES

Cases	Page
Armijo v. Atchison, Topeka and Santa Fe Railway Co., 19 F.3d 547, *modified*, 27 F.3d 481 (10th Cir. 1994)	5
Bowen v. Georgetown University Hospital, 488 U.S. 204, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988)	3
CSX Transportation v. Easterwood, 742 F.Supp. 676 (N.D. Ga. 1990), 933 F.2d 1548 (11th Cir. 1991), 113 S.Ct. 1732 (1993)	*passim*
Earwood v. Norfolk Southern Railway, 845 F.Supp. 880 (N.D. Ga. 1993)	11
Hatfield v. Burlington Northern Railroad Co., 958 F.2d 320 (10th Cir. 1992), *vacated and remanded*, 113 S.Ct. 1940 (1993), 1 F.3d 1071 (10th Cir. 1993), *on remand*, 848 F.Supp. 158 (D. Kan. 1994)	4, 5, 7
Shots v. CSX Transportation, Inc., 38 F.3d 304 (7th Cir. 1994)	5, 6, 7
Thiele v. Norfolk and Western Railway Co., 873 F.Supp. 1240 (N.D. Ind. 1994)	6

Regulations

Railroad-Highway Projects, 23 C.F.R. §646.214	*passim*
Manual on Uniform Traffic Control Devices for Streets and Highways, 23 C.F.R. §655.603	4
Highway Safety Improvement Program, 23 C.F.R. §924	4
Selection and Installation of Grade Crossing Warning Systems, 41 Fed. Reg. 11,649 (1995)(to be codified at 49 C.F.R. §234.301-303)(proposed March 2, 1995)	3

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,

Petitioner

v.

MALONE FREIGHT LINES, INC.,
QUANTUM SERVICES, INC. and
TAMMY HIBSHMAN, as the Personal Representative of
the Estate of Brian Hibshman, Deceased,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

This case arises from an accident on June 20, 1991 involving a tractor-trailer driven by Brian Hibshman and a train owned by St. Louis Southwestern Railway ("Railway") at a railroad crossing on U.S. Highway 79 near Proctor, Arkansas (the "Crossing"). Brian Hibshman was killed in the accident. The tractor was owned by Quantum Services, Inc. ("Quantum") and leased to Malone Freight Lines, Inc. ("Malone").

At the time of Brian Hibshman's fatal accident, the Crossing was not protected by automatic crossing gates with flashing lights. These warning devices are specifically required by 23 C.F.R. §646.214(b)(3), the federal regulation upon which Railway's claim of pre-emption is based. The size of the lens in the existing signals at the Crossing had been changed from eight inches to twelve inches pursuant to the recommendation of a diagnostic team in August of 1989, but the automatic crossing gates with flashing lights, which were also recommended by the diagnostic team in 1989, had still not been installed at the Crossing on the day of the fatal accident nearly two years later.

In the course of the litigation that followed, Tammy Hibshman, the widow of Brian Hibshman and the personal representative of his estate, Quantum and Malone (collectively, the "Respondents"), each asserted that Railway breached its duty under Arkansas law to provide adequate warning devices at the Crossing, the site of a number of prior accidents. Railway moved for summary judgment contending that these state law claims were pre-empted under 23 C.F.R. §646.214(b)(3). Despite the absence of the federally mandated warning devices at the Crossing, Railway argued, and the District Court found, that Railway's duty under Arkansas common law to provide adequate warning devices at the Crossing was pre-empted when the Federal Highway Administration (the "FHA") approved the upgrade plan for the Crossing in late June of 1990, nearly one year before the accident.

The Eighth Circuit, in a unanimous decision, ruled against Railway and reversed the District Court. Pet. App. A. The Eighth Circuit held that under this Court's decision in *CSX Transportation, Inc. v. Easterwood*, 113 S.Ct. 1732 (1993), and the language of the applicable regulations (23 C.F.R. §646.214(b)(3),(4)), federal funds did not participate in the

installation of automatic crossing gates with flashing lights until those gates were actually installed and operating. The Eighth Circuit therefore concluded that Respondents' inadequate warning device claims were not pre-empted.

REASONS FOR DENYING THE WRIT

Review should be denied in this case because *Easterwood* was correctly applied here and there is no conflict among the circuits which requires this Court to grant certiorari. Moreover, the issue is not of enough significance to warrant plenary review.

In the relatively short time since *Easterwood* was decided just two years ago, only a handful of decisions have even addressed the pre-emption issue, and so far the Eighth Circuit is the only federal court of appeals to have the benefit of a fully developed record on the upgrade activities at the crossing at the time of its decision. These circumstances suggest that it is premature for this Court to revisit the very narrow and often fact-bound issue of federal pre-emption at grade crossings so soon after the decision in *Easterwood*.

Perhaps even more importantly, the Federal Railroad Administration has recently proposed regulations specifically addressing the allocation of responsibility for the selection and installation of grade crossing warning devices. 41 Fed. Reg. 11,649 (March 2, 1995). If adopted, these regulations purport to resolve the legal issue Railway is currently asking this Court to address.[1] As a result, and contrary to Railway's contention, this case is a poor vehicle for this Court to use to explore the narrow issues presented here regarding federal

---

[1] The proposed regulations, even if adopted, would not apply to pending cases, such as this one. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988).

pre-emption at grade crossings when, except for a handful of pending cases, the regulatory process may well supersede any decision by this Court. Even if the proposed rules are not adopted, there will be ample opportunity for the Court, if it so chooses, to review this precise pre-emption issue after the question has been fully and finally examined by other courts. In short, all of the traditional factors considered by this Court suggest that certiorari should not be granted in this case.

A. There Is No Conflict Among The Circuits Which Requires This Court To Grant Certiorari.

Railway first contends that this case creates an improper conflict in the circuits which requires this Court's intervention, pointing to the Tenth Circuit's position in *Hatfield v. Burlington Northern Railroad Co.*, 958 F.2d 320 (10th Cir. 1992), *vacated and remanded*, 113 S.Ct. 1940 (1993), *on remand*, 1 F.3d 1071 (10th Cir. 1993). In fact, Railway asserts that the Eighth Circuit improperly "brushed this authority aside" without a sufficient explanation. Railway Pet. at 8.

In *Easterwood*, this Court quoted from the original *Hatfield* decision with disfavor and expressly rejected its broad view that railroads' responsibility for grade crossing safety was pre-empted by the "Federal Grade Crossing Safety Program" as set forth in 23 C.F.R §924 and 28 C.F.R. §655.603 et seq. (the "Federal Program"). 113 S.Ct. at 1739. Pursuant to the Federal Program, crossings are evaluated and upgrade priorities are set after consideration of the dangers posed by the various crossings. 113 S.Ct. at 1738. On remand, the Tenth Circuit, in a two page opinion, concluded that it had insufficient facts to rule on the pre-emption issue and remanded the case to the District Court. 1 F.3d at 1071-72. In the course of doing so, the Tenth Circuit renewed, in passing, its

broad interpretation of 23 C.F.R. §646.213(b)(3), a view rejected by this Court. 1 F.3d at 1072.[2]

The Tenth Circuit's comments are essentially dicta. More importantly, these comments ignore (a) this Court's analysis in *Easterwood*, which focused on whether warning devices had been installed at the crossing to determine if federal funds had participated in their installation, and (b) the fact that the same type of preliminary activity that the Tenth Circuit suggests can trigger pre-emption had actually occurred at the crossing in issue in *Easterwood* and yet, this Court expressly concluded that the plaintiff's inadequate warning claims were not pre-empted. The Eighth Circuit accurately grouped *Hatfield* among those cases which are "either factually distinguishable or contrary to *Easterwood*." Pet. App. A-6.

Railway also suggests that the Eighth Circuit's decision conflicts with a decision in the Seventh Circuit, citing the Seventh Circuit's recent decision in *Shots v. CSX Transportation*, 38 F.3d 304 (7th Cir. 1994). *Shots* is not in conflict with the Eighth Circuit's decision. In *Shots*, CSX railroad had installed reflectorized cross-bucks at 2,638 crossings, including the crossing where the accident in issue occurred. These installations were done pursuant to an agreement with the state which was funded by the federal government. The railroad argued that, since federal funds "participated" in the installation of these passive warning devices, the provisions of 23 C.F.R. §646.214(b)(4) (not 23 C.F.R. §646.214(b)(3)) clicked in, and any state law claim that it was negligent in not having additional warning devices at the

---

[2] In *Armijo v. Atchison, Topeka and Santa Fe Railway Co.*, 19 F.3d 547, 551, *modified*, 27 F.3d 481 (10th Cir. 1994), also cited by Railway, the Tenth Circuit quoted from *Hatfield*, but again concluded that remand was necessary to determine whether pre-emption had occurred. Railway mistakenly fails to note that the opinion to which it cites was subsequently modified and the remand ordered.

crossing was pre-empted by the provisions of the regulation. The railroad's argument required the Seventh Circuit to resolve the issue whether federal pre-emption had occurred under subsection 4 of 23 C.F.R. §646.214(b), which provides that "the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, *is subject to the approval of the FHWA.*" (emphasis added).

In stark contrast to the language of 23 C.F.R. §646.214(b)(***3***) (the regulation at issue in *Easterwood* and this case), federal approval of the warning devices at the crossings governed by 23 C.F.R. §646.214(b)(4) is specifically designated as the key event which triggers pre-emption. It is therefore understandable that the *Shots* court analyzed the existence of federal approval, ultimately concluding that the mere signing of the agreement did not constitute federal approval of the warning devices at the crossing.

The Seventh Circuit's analysis hardly contradicts this Court's analysis of 23 C.F.R. §646.214(b)(***3***) in *Easterwood.* Subsection 3 governs the warning devices required at crossings that feature multiple tracks, heavy traffic, or the like, and pursuant to its plain language, crossing gates with flashing lights are mandated. Pursuant to the express language of subsection 3, the pre-emption inquiry does not focus on federal approval. Instead, the inquiry is whether federal funds participated in the installation of the automatic crossing gates with flashing lights. Unlike subsection 4, subsection 3, does not contain the words "federal approval". Plainly, different types of crossings and different regulations are at issue in these cases.[3] See *Easterwood*, 113 S.Ct. at 1739, 1741. If anything,

---

[3] In *Thiele v. Norfolk and Western Railway Co.*, 873 F.Supp. 1240 (N.D. Ind. 1994), noted at page 10 of Railway's Petition, the District Court overlooked the difference in the language of subsections 3 and 4, and

the difference in the language between the two regulations reaffirms that federal approval alone is insufficient to trigger pre-emption under 23 C.F.R. §646.214(b)(*3*). The *Shots* court itself recognized as much, noting that the issue in *Easterwood* and *Hatfield* was different than the one it confronted. 38 F.3d at 305-06.

B. The Eighth Circuit Correctly Applied This Court's Decision in Easterwood.

Railway also contends that certiorari is appropriate in this case because the Eighth Circuit misapplied *Easterwood*. Railway, not the Eighth Circuit, is in error.[4]

In *Easterwood*, this Court expressly rejected the argument that a railroad's state law duty to provide adequate warning devices was pre-empted by the adoption of the Federal Program. Id. at 1739-40. This Court then analyzed 23 C.F.R. §646.214(b)(3) and (4), and concluded that federal pre-emption does occur if federal funds participate in the installation of the specified warning devices. *Id.* at 1741. This Court reasoned that when these regulations are applicable to a particu-

---

as a result, failed to recognize that the Seventh Circuit was resolving a different issue in *Shots* than had been resolved by the Eighth Circuit in this case. As a result, the District Court's conclusion that the Eighth Circuit's decision in this case was inconsistent with the Seventh Circuit's decision in *Shots* is wrong.

[4] Railway's position in its Petition for Certiorari is different from its position before the Eighth Circuit in its brief to the panel (although it did take this position after the fact in its petition for rehearing). Here Railway argues that federal approval alone is sufficient to trigger pre-emption. Railway Petition at 10. Previously, Railway argued that if the federal approval is "followed in due course by the installation and federal funding of the upgrade", then pre-emption occurs. Railway Eighth Circuit Brief at 7, 11-12, 27. As noted, the Eighth Circuit specifically and properly rejected that argument. Pet. App. A-6.

lar crossing, the types of warning devices are specifically mandated and therefore federal pre-emption occurs. *Id.*

This Court's application of 23 C.F.R. §646.214(b)(3) to the facts in *Easterwood* demonstrates that pre-emption is triggered by the actual installation of the federally mandated warning devices. The relevant facts were explained in detail in *Easterwood*. See 113 S.Ct. at 1740-1741. Based on those facts, this Court concluded that federal pre-emption had not occurred. *Id.* This Court's reasoning, which follows immediately after the detailed factual discussion, was as follows:

> These facts do not establish that federal funds "participate[d] in the installation of the [warning] devices" at Cook street. *The only equipment installed was the motion-detection circuitry.* Such circuitry does not meet the definition of warning devices.... *Id.* at 1741 (emphasis added).

As the Eighth Circuit correctly observed, "[r]ather than looking to federal approval or fund allocation as triggering pre-emption, the Supreme Court focused on the equipment installed at the crossing." Pet. App. A-5.[5]

---

[5] The Eighth Circuit specifically observed that tying pre-emption solely to federal approval is inconsistent with the Federal Railroad Safety Act's goal of promoting safety at railroad crossings. As the Eighth Circuit explained:

> Before pre-emption, the public is protected by a railroad's state common-law duty of care. After installation of federally mandated warning devices, the public is protected by those devices. A plan to install devices and federal approval of a plan do not protect the public, however. The Railway's interpretation that federal approval triggers pre-emption would leave the public unprotected between the time of approval and the time the prescribed devices are installed and operating.

Pet. App. A-6,7. In contrast, a rule linking pre-emption to actual installa-

Despite this Court's analysis, Railway argues that the Eighth Circuit erred by making faulty assumptions about the presence of federal approval and federal funds in *Easterwood*. Railway's argument, in addition to being factually dubious, convincingly demonstrates that the actual installation of the federally mandated warning devices, not federal approval, is the critical pre-emption event. After this Court stated its ruling regarding the source of pre-emption, and its discussion turned to whether the regulation was applicable to the crossing in question, it did not mention the presence or absence of federal approval at the crossing. Instead, this Court applied the regulation by analyzing what equipment had actually been installed. If federal approval was the linchpin of the pre-emption analysis, surely this Court would have expressly stated so.[6] Therefore, contrary to Railway's contention, the *most*

---

tion encourages railroads to promptly install the federally prescribed warning devices. The importance of such an incentive is vividly illustrated by the facts in this case. As one example, installation of the gates was delayed by five months because Railway did not maintain an inventory of essential component parts for signal boxes, even though it builds 85-100 of these boxes each year, and the same component parts are used in each box. Eighth Circuit Joint Appendix, p. 80.

[6] If federal funding and approval were not present in *Easterwood*, as contended by Railway, then this Court could have resolved that case simply by stating that state, not federal, funding and approval were involved. This Court had already carefully explained that despite the fact that the states have long had final authority for the installation of particular safety devices at grade crossings, this did not excuse a railroad from its common law duty to maintain a safe crossing. Id. at 1738 n.5, 1739. Therefore, this Court, by continuing its analysis past the existence of state involvement, clearly contemplated that federal approval and federal funds were involved at the Cook street crossing.

The arguments raised by the parties in *Easterwood* further support this point. The principal issue before both the district court and the Eleventh Circuit was whether pre-emption was triggered by the Federal Program. When the case was taken to this Court, the Solicitor General advocated

that can be derived from the silence as to federal approval is that it was not the pivotal event triggering pre-emption.

In any event, it is virtually certain that the Eighth Circuit's analysis of the existence of federal funding and federal approval was correct. Immediately following the foregoing analysis in *Easterwood*, this Court stated:

> Petitioner [the CSX railroad] nevertheless contends that the Cook Street crossing was part of a single project to improve the five Cartersville crossings, and that the regulations were applicable because federal funds participated in the installation of gates at the other four crossings. *Id.* at 1741-42.

Railway now contends that "[a]t no point, however, did the Supreme Court characterize the Cook Street crossing funds as 'federal' funds." Railway Pet. at 11. Even if this is in some sense literally correct, it is at best a highly tenuous interpretation. As the quoted language demonstrates, five adjacent crossings were involved in *Easterwood*, including the Cook street crossing, and funds were set aside. The upgrades were completed at the other four projects and, as the CSX railroad argued to this Court, were paid for with federal funds. *Id* at 1741-42. Under any normal reading of this language, it is read-

---

the position ultimately adopted by this Court, namely that the "program" did not trigger pre-emption, but pre-emption did occur under 23 C.F.R. §646.214(b) if the crossing was *"improved with the use of federal funds"* and only where there was no showing of intervening "changed circumstances" or railroad negligence in the upgrade process. Solicitor General Br. at 24 & n.26 (emphasis added). The CSX railroad responded to the Solicitor General's argument by asserting, in part, that federal approval had surely been given in *Easterwood* because the federal funds set aside for the Cook street crossing could not have been set aside for the proposed upgrades without a federal determination that the proposed crossing gates were adequate. CSX Transportation, Inc. Reply Br. at 19, 20. *Cf.* at 21-22.

ily apparent that the funds set aside for the Cook street crossing were also federal funds.[7] Certainly this Court made no effort to distinguish the nature of the funds set aside for the Cook street crossing from the federal funds used to pay for the adjacent crossings—a point certainly worth making if such a distinction existed and was critical to this Court's analysis. Finally, as Railway acknowledges, the presence of federal funds to pay for a project is indicative of federal approval for the project. Railway Pet. at 12.

In short, Railway is wrong in its contentions that the Eighth Circuit erred in some of its statements regarding the existence of federal funds and federal approval in *Easterwood*. More importantly, however, these two factors were plainly not the critical events in this Court's analysis in *Easterwood* of what triggers federal pre-emption.[8]

C. The Recently Proposed Regulations Support The Denial Of Certiorari.

As noted, the Federal Railroad Administration has just

---

[7] *See Earwood v. Norfolk Southern Railway*, 845 F. Supp. 880, 886 (N.D. Ga. 1993)("In *Easterwood* federal funds had been earmarked for the signals at the intersection but later reallocated"). See also the syllabus to *Easterwood* ("federal funds allocated for the project diverted elsewhere.") 113 S. Ct. at 1735.

[8] Railway also states that the Eighth Circuit made other errors of law, arguing that the replacement of larger lenses at the Crossing constituted the installation of an active warning device. Railway Pet. at 12.n.4. The modification of an existing warning device is not the same as the installation of a new active warning device. Pet. App. A-7. Moreover, the warning devices mandated by 23 C.F.R. §646.214(b)(3) are "automatic gates with flashing light signals." As the Eighth Circuit correctly explained, "we hold preemption occurs when *all the devices prescribed in the FHA-approved upgrade plan are installed and operating.*" *Id.* (emphasis added). Railway of course had failed to install these devices by the time Brian Hibshman was killed.

proposed regulations that specifically address the allocation of responsibility for grade crossing upgrades. In essence, these regulations propose that the existence of the Federal Program, and a railroad's participation therein, should pre-empt the state law duties imposed on railroads to provide adequate warning devices at grade crossings. These regulations therefore purport to effectively overturn this Court's decision in *Easterwood* which, as noted, concluded that a railroad's state law duties could compliment the Federal Program's procedures for evaluating, rating and upgrading grade crossings.

Railway offers a drawn out argument on how these proposed regulations suggest that the Eighth Circuit erred and why certiorari should be granted to remedy this error. Railway Pet. at 13-18.[9] Despite these efforts, the actual implication of the proposed regulations on whether to grant certiorari in this case is plain: they strongly counsel against granting certiorari.

If the proposed regulations are adopted, then the issue in this case, whether federal pre-emption occurs only upon actual installation of the federally mandated warning devices, will have ostensibly been answered by the regulations for all future cases and the focus will turn to the legality of those regulations and their correct application. Any decision by this Court in the interim will impact only a handful of cases which are currently pending. Alternatively, if the proposed regulations are not adopted, other courts will have an opportunity to consider the pre-emption issue on fully developed factual records. If the conflict urged by Railway does in fact emerge in subsequent cases, this Court (if it decides the issue merits

---

[9] Railway makes the remarkable assertion that in *Easterwood,* this Court "considered briefly" whether the Federal Program triggered pre-emption. Pet. App. A-7. The pre-emptive effect of the Federal Program was of course a central focus of the analysis. See 113 S.Ct. at 1737-40.

review) will then have the benefit of those courts' analysis and the issue will have been fully framed. Given the role this Court should properly play in our appellate system and the competing demands on the Court's time and resources, it makes little sense to grant certiorari in this type of situation where the Court's decision may have such little precedential value. It makes much more sense for this Court to wait and see whether the proposed regulations are adopted before it decides whether it needs to revisit the very narrow issue of federal pre-emption at grade crossings raised in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MALONE FREIGHT LINES, INC., AND QUANTUM SYSTEMS, INC.

By their attorneys

MOYER & BERGMAN, P.L.C.
Robert E. Konchar (LI3986)
Michael McDonough (LI8686)
Stan Herkelman (LI13887)
2720 First Avenue N.E.
P.O. Box 1943
Cedar Rapids, IA 52406-1943
P: (319) 366-7331
F: (319) 366-3668

AND

Wm. David Duke (79056)
ROBINSON, STALEY & MARSHALL, P.A.
400 West Capitol
Suite 2891
Little Rock, AR 72201
P: (501) 374-3818
F: (501) 376-2800

TAMMY HIBSHMAN, AS PERSONAL REPRESENTATIVE

By her attorneys

ROBINSON, STALEY & MARSHALL, P.A.
Wm. David Duke (79056)

400 West Capitol
Suite 2891
Little Rock, AR 72201
P: (501) 374-3818
F: (501) 376-2800